

October 1, 2020

Via Email to [ATR.BankMergers@usdoj.gov](mailto:ATR.BankMergers@usdoj.gov)

United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
Attn.: Antitrust Division

**Re: 1995 Bank Merger Guidelines**

Ladies and Gentlemen:

This letter is in response to the invitation published on September 1, 2020, by the Antitrust Division of the Department of Justice (the “Division”) to comment on the Division’s consideration of whether to revise the 1995 Bank Merger Competitive Review – Introduction and Overview (the “1995 Guidelines”) or the Division’s competitive analysis of bank mergers.

In its publication, the Division sought specific public comments on a variety of topics and issues. We appreciate the opportunity to comment and have addressed some of the issues identified by the Division. We have reproduced in bold type below the specific topics and questions addressed, with our comment following each heading in normal font.

As discussed below, we believe that:

- (a) the 1995 Guidelines are largely irrelevant as to competition in providing banking products and services to consumers and small business, which is driven by the availability of those products and services rather than the fictional location of deposits;
- (b) the use of deposit amounts as a proxy to measure competition for a wide variety of banking products and services is no longer valid (notwithstanding the ready availability of deposit data);
- (c) the Herfindahl-Hirschman Index should be discarded, but if retained it should fully reflect the availability of online competitors and presumptively include credit unions with 100% weighting; and
- (d) more generally, except in the case of combinations so large that they could create new systemic risk, the Division should not block any combination for anticompetitive effects absent the presentation of compelling evidence from public comment that a particular proposed transaction would materially limit competition in markets where there are unique barriers to entry, such as extremely limited internet or cellular network access.



## Herfindahl-Hirschman Index (HHI) Threshold

- **Should the screening thresholds in the 1995 Banking Guidelines be updated to reflect the HHI thresholds in the 2010 Horizontal Merger Guidelines? If so, please explain why with evidence, if available.**

No. The HHI itself is of dubious relevance as discussed below in our responses to the questions under “Non-traditional Banks”. As the 2010 HHI thresholds are more restrictive than those in the 1995 Guidelines, adopting the former would result in tighter application of an archaic metric, providing little marginal benefit while depriving all stakeholders of the benefits of combinations that could result in more efficient, less costly, and more competitive delivery of banking products and services to consumers and small-to-midsized businesses.

## Non-Traditional Banks

- **Should the Division include non-traditional banks (*e.g.*, online) in its competitive effects?**

Yes. A review of the effects of a proposed bank merger on competition should reflect all providers that compete to provide the products and services at issue to the persons to whom the combining banks may provide them. Online banks render geography irrelevant to a large portion of such customers and provide virtually all of the products and services provided by conventional banks. For example, Quicken Loans has claimed that it is the largest mortgage lender in America<sup>1</sup>. An analysis that excludes Quicken in measuring competition for lenders to make mortgage loans in any state or county would be divorced from reality. Similarly, numerous competitors provide online small-business products and services in markets where they have no physical presence<sup>2</sup>, and research by Raddon (a Fiserv affiliate) has found that “57% of all households that opened any sort of deposit account opened an account online”<sup>3</sup>. Such providers must be reflected for any measure of competition to be meaningful.

- **Does the Division give appropriate weight to online deposits?**

No. As discussed below, we question whether deposit data remain a good proxy for competition generally among providers of banking products and services to consumers and small-to-mid-size businesses. To the extent deposit data are used, they should reflect not just the amount of deposits but the availability of deposit services. To truly reflect competition, any such measure must include all providers of deposits accounts whose products and services are available (or could be made available due to low market entry barriers) to those to whom the products and

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<sup>1</sup> <https://www.quickenloans.com/press-room/2018/02/01/quicken-loans-becomes-largest-home-lender-america/>.

<sup>2</sup> See, *e.g.* <https://www.fastcapital360.com/business-loans/guides/online-business-loan/> and <https://smallbusinessloans.co/capital-one-small-business-loan-review/>.

<sup>3</sup> <https://thefinancialbrand.com/92797/deposit-checking-savings-time-certificate-cd-online-direct-bank/>





services of the combining banks are available. This would include any provider of online deposit services, including both online banks and traditional banks and other institutions (such as credit unions and thrifts) that provide such services.

- **Does the Division give appropriate weight to credit unions and thrifts?**

No as to credit unions. As we understand the current approach, credit unions are presumptively excluded, but may be included with 50% weighting under some circumstances and, in rare circumstances, with 100% weighting. This might have been appropriate 25 years ago. However, two things have changed since then. First, credit unions have generally broadened their membership criteria so that they are in many cases no longer effectively limited as to membership in a geographic area.<sup>4</sup> Second, in recent years, credit unions have increasingly been acquiring banks. One of the primary rationales for these acquisitions is to enhance the acquiring credit union's ability to compete in providing small business lending<sup>5</sup>. This reflects an increasing trend for credit unions to provide a full panoply of consumer and small business banking products and services. In light of these two changes, there is no longer justification to accord less than 100% weight to credit unions.

As discussed below, we believe the Division should discard the HHI. If it does not, then it should presumptively include credit unions at 100% in recognition of the vast expansion in credit unions' membership eligibility and banking products and services in recent decades. At a minimum, 100% weight should be given to any credit union that (a) has acquired a bank (just as a thrift owned by a bank is given 100% weight) or (b) is potentially open to membership to 70% or more of the residents of a market (the current standard for inclusion with 50% weighting).

- **Given that the geographic dispersion of deposits from online banks is not publicly available (by market or branch), suggest how these institutions can be incorporated into screening and competitive effects analysis.**

In our view the geographic dispersion of deposits from online banks is irrelevant in determining how their presence affects competition among financial institutions. If a consumer or small businessperson can open an account, make deposits and pay bills online or through a cellular

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<sup>4</sup> See, e.g., National Credit Union Administration, "Chartering and Field of Membership", 12 CFR Part 701, <https://www.ncua.gov/support-services/credit-union-resources-expansion/field-membership-expansion> and <https://www.depositaccounts.com/credit-unions/anyone-can-join/>.

<sup>5</sup> See Federal Reserve Bank of St. Louis, "Why are More Credit Unions Buying Banks?", <https://www.stlouisfed.org/publications/regional-economist/first-quarter-2019/credit-unions-buying-community-banks> ("[I]t may be the fastest way to expand into new business lines that are more closely associated with banks (for example, business lending). The average ratio of business loans to total loans for the acquiring credit unions in the quarter before the transaction was 8.6 percent, whereas the average for the acquired banks was 33.8 percent. The acquisitions of the commercial banks raised the business-loans-to-total-loans ratio in the credit unions to 10.9 percent." (footnote omitted)).





network, and can obtain cash from an ATM, it doesn't matter where the provider's other deposits are "located" (quotes because the "location" of deposits is largely fictional in any event). A more meaningful measure would reflect the availability of all competitive products and services to the customers that are or could be served by the merging institutions.

Changes in the industry and societal changes in the last 25 years also suggest that deposit data are no longer a useful metric for the amount of competition in providing nondeposit banking products and services to consumers and small businesses, such as consumer and small business lending. Many providers of such services do not even take deposits. The main reason for using deposits in the HHI Index has been that deposit data are more readily available than other data<sup>6</sup>. This was a useful proxy when consumer and small-business loans were available only from depository institutions physically located near the customer. Because this is no longer true, the connection of deposits to these other services has become more attenuated and may have reached the point where the harm from its use – both falsely positive and falsely negative evaluations of the effect of a combination on competition – outweigh the convenience of having a single simple measure that is easy to calculate from readily available data.

One response to the foregoing would be to use a combined score reflecting the availability in person, online, or over cellular networks of each of the major components of concern to the Division – consumer deposits, consumer lending, small business deposits, and small business lending. This should include any provider whose services are available to actual or potential customers of the combining institutions, regardless of the dispersion of the competing providers' products and services. But attempting to measure competition in all relevant products and services would require obtaining data that are not as readily available and perhaps not as precise as deposit amounts, and would ultimately be arbitrary in the weighting assigned to various products and services. That, however, is no reason to continue using a metric that is known to be wrong. It forces one to recognize that any measurement of competition will be imprecise, and as markets, society, and technology continue to evolve, will become even less precise, with a bias for underestimating competition. For these reasons, the Division should consider approving all proposed combinations (other than those so large that they may create systemic risk) unless public commentators produce compelling data to show not only that the combination would significantly reduce competition, but also that rare external factors, such as low internet and cellular penetration, pose significant barriers to entry in the relevant markets.

All of these considerations apply with particular severity to brick-and-mortar community banks ("CFI's"), which must compete nimbly with online providers, as well as with large nationwide banks that have spread out nationwide with expanded interstate and branch banking over the last 25 years. Many CFI's need to combine to remain competitive against online competitors and nationwide brick-and-mortar competitors, which are active online or physically in virtually every state. The smaller the transaction, the more the costs are likely to exceed the benefits of using an arbitrary metric that can be expensive and difficult to contest, even when it yields irrational results. Moreover, even if a combination of such CFI's resulted in a temporary near-monopoly,

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<sup>6</sup> See, e.g., *Walter and Westcott, Antitrust Analysis in Banking: Goals, Methods, and Justifications in a Changed Environment*, 94 *Economic Quarterly* 1, 45-72, p. 51 (Winter 2008).



all of the developments described above have lowered barriers to enter the market and restore competition. Continued reliance on the 1995 Guidelines increasingly results in consumers and small businesses bearing the cost of less efficient banking products and services as this archaic metric prevents combinations that ultimately would be beneficial to consumers and small businesses. Therefore the Division should, at a minimum, presumptively approve transactions below some minimum threshold, such as where the consideration being paid for the target is less than \$10 billion, or the combined institutions would have assets of less than \$50 billion. As discussed above, this presumption should be rebuttable only by compelling evidence provided by public commentators.

Thank you again for the opportunity to comment. Please feel free to call Susan Sturm, Chief Financial Officer, at [REDACTED] or Koger Propst at [REDACTED] with any questions about our comments.

Very truly yours,

Koger L. Propst  
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